only.[13] The exception in the case of an alien defendant arose from necessity, and there is no support for extending it to cases where a citizen is the defendant and the necessity for the exception is absent. When a resident plaintiff sues an alien and the latter petitions for removal the plaintiff's consent is obviously unnecessary. But if the plaintiff be a non-resident citizen his consent is essential to the Federal court's maintenance of the suit on removal, as he was not amenable originally to a court of a district other than his own. Again, where the plaintiff is an alien his consent to a petition for removal is theoretically unnecessary, as he was originally suable in any district. This objection is invalid, however, if the alien plaintiff has acquired a residence.[14] By regarding the petition for removal as process,[15] it might be held that the Circuit Court thus gets jurisdiction of the alien plaintiff, who, for the purposes of the removal, is virtually a defendant.[16] This, however, would still necessitate the consent of a non-resident citizen plaintiff, for the service of original process on him, in any but his own or defendant's district would, without his consent, be insufficient to give the Circuit Court jurisdiction.

In a recent case, *Mahopoulus* v. *Chicago R. R. Co.* (1909) 167 Fed. 165, in which a non-resident alien sued a corporation in a state other than that of defendant's incorporation, the cause was held not removable without the plaintiff's consent, the court making no distinction between the case in which the plaintiff is a non-resident alien and that in which he is a non-resident citizen.[17] Practical considerations may be cited in support of this view. The object of removals in cases involving citizenship or alienage is to avoid the possibility of prejudice in a trial by a state court. Thus, a resident defendant may never remove,[18] but a non-resident always has the right where the suit is brought in the plaintiff's state.[19] Consequently, there is no necessity for a removal from the courts of a neutral state. Further, to hold an alien plaintiff's consent necessary subserves the general purpose of the Removal Acts, which was to contract the jurisdiction of the Federal courts, both original and on removal.[20]

THE DEVISABILITY OF CONTINGENT REMAINDERS AND EXECUTORY DEVISES AT COMMON LAW.—The common law test of devisability of estates and interests in real property is difficult of determination. By the terms of the Statutes of Wills seisin in the devisor was apparently intended to be the test.[1] The Statutes provide that all persons "having manors," etc., and, as amended, "having a sole estate, or interest in fee simple * * * in pos-

[13]Galveston R. R. Co. *v.* Gonzales (1893) 151 U. S. 496; Campbell *v.* Duluth Co. (1892) 50 Fed. 241.

[14]Walker *v.* O'Neil (1889) 38 Fed. 374.

[15]Kinney *v.* Savings Bank Ass'n. (1903) 191 U. S. 78.

[16]La Montagne *v.* Lumber Co. (1891) 44 Fed. 645.

[17]Morris *v.* Clark Construction Co. (1905) 140 Fed. 756; but see Barlow *v.* Chicago R. R. Co. (1908) 164 Fed. 765, *contra.*

[18]Western Union Tel. Co. *v.* Brown (1887) 32 Fed. 337.

[19]Gavin *v.* Vance (1887) 33 Fed. 84; Fales *v.* Chicago R. R. Co. (1887) 32 Fed. 673; Cooley *v.* McArthur (1888) 35 Fed. 372.

[20]Shaw *v.* Quincy Mining Co. (1892) 145 U. S. 444; Jackson Co. *v.* Pearson (1892) 60 Fed. 113, 127.

[1]The view that the devisor needed both right to and possession of the land devised doubtless applied only to devises of estates in possession, and affords no general rule. Shep. Touch. 428, § 13.

session, reversion, (or) remainder," may devise their interest.[2] Early authorities construed these words strictly, and stated that the testator must have been seised at the time of making his will, and continue to be seised until his death.[3] In many cases the devise was declared void, apparently because there was no seisin in the devisor. A right of entry, for condition broken or on a disseisin, was not devisable;[4] the possibility of inheritance from an ancestor was not devisable;[5] freehold acquired after making a will would not pass by the will;[6] nor would a contingent remainder, where the person to take was uncertain.[7] In the case of a contingent remainder, or of an executory devise, where the person to take was certain, such person had no seisin, for in the case of a contingent remainder the seisin was in the tenant of the supporting freehold estate;[8] and in the case of an executory devise, it was either in the heir of the creator of the devise or, if a freehold estate intervened, in the holder of the intermediate estate.[9] Because of lack of seisin it was held that there was neither dower nor courtesy in such contingent or executory interests.[10] If, therefore, the test of devisability was seisin in the devisor, it necessarily followed that a contingent remainder or an executory devise, even when the person to take was certain, ought not to pass under a will.

Another test of devisable interest that was advanced was assignability *inter vivos,* that is, a testator could devise only that which he could assign during his lifetime.[11] At common law a contingent remainder or an executory devise was too remote an interest to be transferred *inter vivos.*[12] The assignee under a voluntary assignment took nothing except by way of estoppel. Equity, it is true, would enforce such an assignment if based on a valuable consideration, but the resort to equity in itself shows the inadequacy of the legal conveyance.[13] At common law these contingent and executory interests were not liable to sale under execution, as there was not a sufficiently definite interest in the judgment debtor.[14] Accordingly, by the test of assignability, neither a contingent nor an executory interest could pass by devise.

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[2]Statutes of Wills, 32 Hen. VIII c. 4, § 4; amended in 34 & 35 Hen. VIII c. 5 § 4.

[3]Cruise Dig. Tit. 38 Ch. 3 §§ 24, 28; 2 Blackstone 375; 1 Jarman, Wills (5th Ed) 51; Brunker *v.* Cook (1707) 11 Mod. 122; Hogan *v.* Jackson (1775) Cowp. R. 299, 305; Brydges *v.* Duchess of Chandos (1794) 2 Ves. Jr. 417, 427; Minuse *v.* Cox (N. Y. 1821) 5 Johns. Ch. 441, 450. Under modern statutes seisin at the time of death is sufficient. 1 Redfield, Wills 387-8.

[4]Atty. Gen. *v.* Vigor (1803) 8 Ves. 256, 282; Goodright *v.* Forrester (1807) 8 East 552, 566; Doe *v.* Hull (1822) 2 D. & Ry. 38, 41; Upington *v.* Corrigan (1896) 151 N. Y. 143, 147. Rights of entry are now devisable by statute in England and most of the United States.

[5]1 Redfield, Wills 389; Jones *v.* Roe (1789) 3 Durn & E. 88, 93 (*dictum*).

[6]Brunker *v.* Cook, *supra;* Langford *v.* Pitt (1731) 2 P. Wms. 629, 631; Hogan *v.* Jackson, *supra;* and see generally authorities cited in note 2.

[7]Doe *v.* Tomkinson (1813) 2 Maule & S. 165.

[8]1 Fearne, C. R. 281 ff.; Williams, Real Prop. (15th Ed) 318; Williams, Seisin 4 & 5.

[9]Reeves, Real Prop. §§ 623, 657, and authorities there cited.

[10]Com. Dig. Dower A 6, 7; 1 Fearne, C. R. 346; House *v.* Jackson (1872) 50 N. Y. 161; Durando *v.* Durando (1861) 23 N. Y. 331, which holds there can be no dower in a vested remainder because no seisin.

[11]Shep. Touch. 424 (8).

[12]1 Shep. Touch. 239; 4 Kent Com. 260; Robertson *v.* Wilson (1859) 38 N. H. 48.

[13]Mitchell *v.* Winslow (1843) 2 Story (C. C.) 630; 4 Kent Com. 262.

[14]1 Freeman, Executions (2d Ed) § 178; Jackson *v.* Middleton (N. Y. 1866) 52 Barb. 9. In Massachusetts it has been held that such interests pass under the U. S. Bankruptcy acts to an assignee. Belcher *v.* Burnett (1879) 126 Mass. 230.

Again, it was often declared that whatever was descendible was devisable, under the Statutes of Wills;[15] but such a test is unreliable as the exceptions outrun the rule. A right of entry, for condition broken or to recover seisin, though it descended to the heir,[16] was not devisable.[17] A bare possibility descended to the heir of the one entitled to it, but such a possibility was not deemed devisable.[18] Therefore, descendible interests were not necessarily, nor in all cases, devisable.

The earlier view was that contingent and executory interests were not devisable;[19] but the case of *Jones* v. *Roe* established the opposite rule.[20] Lord Kenyon there attempted to distinguish between "bare possibilities," such as the possibility of inheriting from an ancestor, which was not devisable, and a "possibility coupled with an interest," which he declared was devisable. The "interest" in the latter may be less remote than in the former, but if the above tests of devisability are applied there is no force in the distinction.[21] Interest thereby became the determining factor, but that was simply a judicial evasion for in no case was "interest" defined.[22]

A recent case, *Fisher* v. *Wagner* (Md. 1909) 71 Atl. 999, holds that a contingent interest, where the person to take is certain, is devisable, the court relying chiefly on its former decisions. In addition the case may be supported, as the court intimates, under the Maryland statutes, which provide that what is inheritable is devisable[23]—a result which, as previously indicated, did not necessarily follow at common law. If the statute was intended as a reenactment of the common law, it merely adopted without examination the rule of *Jones* v. *Roe;* if, however, the statute was intended to be remedial, objections on the ground of principle are invalid. The case affords an excellent illustration of the modern application of the old rule of *Jones* v. *Roe.*

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[15]Jones *v.* Roe, *supra;* 1 Jarman, Wills 46.

[16]Watkins, Descent 64.

[17]See note 4, *supra.*

[18]Watkins, Descent 5, 86 (1) and (4); 2 Coke Inst. 378 (b); Marks *v.* Marks (1719) 1 Strange 129, 132; Chauncey *v.* Graydon (1743) 2 Atk. 616, 621.

[19]Bishop *v.* Fountaine (Chancery 1694) 3 Lev. 427.

[20]Jones *v.* Roe (K. B. 1789), *supra;* Moore *v.* Hawkins (1765) 2 Eden Ch. Ca. 342; Selwyn *v.* Selwyn (1761) 2 Bur. 1131; Pond *v.* Bergh (N. Y. 1843) 10 Paige 141; Collins *v.* Smith (1898) 105 Ga. 525; 1 Fearne, C. R. 368-370; 4 Kent Com. 261.

[21]Lord Thurlow the following year expressed doubt as to the soundness of Jones *v.* Roe. Perry *v.* Phelips (1790) 1 Ves. Jr. 250.

[22]Because of the holding in Jones *v.* Roe some curiously inconsistent results have been reached. Compare the "remoteness" of the interest in that case with that in Doe *v.* Tomkinson, *supra.*

[23]II Pub. Gen. Laws of Md. Art. 93 § 314.